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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN ESTEBAN LOPEZ,

Defendant and Appellant.

F059831

(Super. Ct. No. BF115450A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush and Louis P. Etcheverry, Judges*.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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* Judge Bush heard the preliminary motion entered on February 25, 2009; Judge Etcheverry presided over the remaining portion of the case relevant to this appeal.

A jury convicted Martin Esteban Lopez of violating Penal Code sections 243, subdivision (d) (battery resulting in great bodily injury),¹ 288 subdivision (c)(1) (lewd and lascivious act on a child 14 years of age), and 242 (misdemeanor battery). He contends the convictions must be reversed because (1) his right to a speedy trial was violated, (2) the trial court erred in admitting his statement to the police because it was obtained in violation of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and (3) the trial court erroneously denied his *Pitchess* motion.² We reject each of these arguments.

Lopez also argues his conviction for violating section 242 must be reversed because it was a necessarily included offense to the violation of section 243, subdivision (d), and two fines must be vacated because they were improperly imposed. We agree with Lopez that his section 242 conviction must be reversed and that one fine must be vacated.

FACTUAL AND PROCEDURAL SUMMARY

The issues in this case require only a short summary of the factual basis for the charges. Additional facts, as necessary, will be provided in the Discussion portion of the opinion.

The charges involved two female victims. The issues in this appeal relate only to one of the females, and we shall refer to her as “the victim.” The violation of section 288 involved the other female, and we shall refer to her as “the minor.”

Lopez and the victim were involved in an intimate relationship for an extended period of time. In December 2005, the victim visited Lopez at Lopez’s home. The two engaged in a sexual episode that included bondage and asphyxiation. The victim claimed

¹All further statutory references are to the Penal Code unless otherwise stated.

²*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

Lopez raped her, while Lopez claimed the encounter was consensual and similar to other sexual episodes the two had shared.

This incident led to two charges -- rape, in violation of section 261, subdivision (a)(2) (count 1), and battery resulting in serious bodily injury, in violation of section 243, subdivision (d) (count 2).

Lopez also was charged with committing a lewd and lascivious act on a 14-year-old girl (the minor), who was at least 10 years younger than he, in violation of section 288, subdivision (c)(1) (count 3), in an incident that occurred several months before the alleged rape. The minor testified Lopez fondled her breast and then put his mouth on her breast.

The original complaint was filed on July 21, 2006. For reasons we shall explain, the trial did not commence until April 20, 2009. Lopez was found not guilty of rape in count 1 but guilty of the lesser included offense of misdemeanor battery (§ 242), guilty of battery causing great bodily injury, and guilty of committing a lewd and lascivious act on a child.

Lopez was sentenced to a total aggravated term of four years eight months, but his sentence was deemed fully served because of the time he spent in custody prior to trial and the credits earned during that time.

DISCUSSION

I. Right to a Speedy Trial

Both the United States and the California Constitutions guarantee a defendant a speedy trial. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) California's speedy trial guarantee is codified in section 1382, which provides that in a case that charges a felony, the defendant must be brought to trial within 60 days of his arraignment. (*Id.*, subd. (a)(2).) This section also provides an exception to this requirement that permits a trial to occur after the stated time period if "good cause to the contrary is shown." (*Id.*, subd. (a).)

Almost three years passed between the time the original complaint was filed and the trial. The reasons for the delay are legion. Lopez was found mentally incompetent for a period of time pursuant to section 1368. He appealed from that order, primarily arguing it was not supported by substantial evidence. We affirmed the order in our nonpublished opinion (*People v. Lopez* (May 21, 2008, F052335)), but the trial court was divested of jurisdiction while the appeal was pending. Lopez's attorneys made section 1368 motions on several other occasions, but they eventually were denied.

On another occasion the prosecution dismissed the complaint on the eve of trial and then refiled the action, apparently because of problems with witnesses.

In addition, Lopez made no less than 10 motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). After one of his *Marsden* motions was denied, Lopez's motion to represent himself was granted. Lopez requested appointed counsel a short time later.

The basis of Lopez's claim that his right to a speedy trial was violated can be found in the later stages of the action. The information³ was filed on January 5, 2009, and Lopez was arraigned on January 13, 2009. At the time of the arraignment, appointed counsel explained he had a very busy trial schedule and, if each of his scheduled trials took place, he would not be available on the date scheduled for commencement of Lopez's trial. Lopez filed several *Marsden* motions before the scheduled trial date, each time raising many issues, including an assertion that he refused to waive his speedy trial right and should have new counsel because appointed counsel would not be available on the scheduled trial date. The trial court denied Lopez's motions, but also continued the trial on several occasions because appointed counsel had various conflicts.

³This filing refers to the information filed after the prosecution voluntarily dismissed the original action.

On March 18, 2009, the trial court relieved appointed counsel. Shortly thereafter new counsel was appointed and a trial was scheduled for April 20, 2009.⁴

Lopez argues the trial court erred when it denied his motion to dismiss the action because it was not brought to trial within 60 days of his arraignment. The trial court denied the motion, concluding there was good cause for the failure to bring the matter to trial because appointed counsel was unavailable. Lopez claims that because the conflicts were apparent from the day trial first was scheduled, and the trial court denied his *Marsden* motions, there was not good cause for the statutory violation.

We will assume, *arguendo*, Lopez is correct that his statutory right to a trial within 60 days of his arraignment was violated. This assumption, however, does not require the reversal of his convictions. A motion made before commencement of trial creates a presumption of prejudice if the defendant's statutory right to a speedy trial is violated; however, "the state Constitution in article VI, section 13, forbids reversal for nonprejudicial error,' and so on appeal from a judgment of conviction a defendant asserting a statutory speedy trial claim must show that the delay caused prejudice, even though the defendant would not be required to show prejudice on pretrial appellate review. [Citation.]" (*People v. Martinez* (2000) 22 Cal.4th 750, 769.)

Lopez does not assert that his defense was hampered by the delay in the trial. Instead, he contends he was prejudiced because the prosecution would not have been permitted to refile the action absent a showing of excusable neglect (§ 1387.1) as it had voluntarily dismissed the action once. Also, he was prejudiced because he served more time than the sentence imposed.

⁴Trial commenced on this date, but on April 21 defense counsel moved the trial court for a hearing pursuant to section 1368, once again suspending the proceedings. Trial began again on October 27, 2009.

In considering whether a defendant suffered prejudice from the denial of his right to a speedy trial, we must “weigh the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself.” (*People v. Wilson* (1963) 60 Cal.2d 139, 151.) Types of possible prejudice noted by the Supreme Court include (1) a potential defense based on the expiration of the statute of limitations had the case been dismissed, (2) where dismissal would bar refile of the complaint, or (3) where the delay prejudiced the defense. (*People v. Johnson* (1980) 26 Cal.3d 557, 574.)

As stated above, Lopez does not argue he was deprived of a defense based on a statute of limitations or that his defense was prejudiced by the delay in prosecution. Instead, he asserts the prosecution could not have refiled the complaint had the case been dismissed because the prosecution voluntarily dismissed the complaint on a prior occasion, and section 1387 bars a third prosecution absent exceptional circumstances.

Lopez concedes, however, a third prosecution is permitted if the offense is a violent felony and either of the prior dismissals was due solely to excusable neglect. (§ 1387.1, subd. (a).) Excusable neglect includes, but is not limited to, error on the part of the trial court, the prosecution, a law enforcement agency, or witnesses. (*Id.*, subd. (b).)

Since Lopez was charged with a violent felony (rape, count 1) within the meaning of sections 1387.1 and 667.5, accordingly, he must demonstrate the prior dismissal was not the result of excusable neglect.

There is an indication that the prior dismissal was the result of witness unavailability, although that is far from clear and the exact circumstances are unknown. Since the appellant bears the responsibility to establish the trial court erred (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230), and it is the appellant’s responsibility to ensure the record includes all information that is necessary to evaluate his or her argument (*Bianco v. California Highway Patrol* (1994) 24

Cal.App.4th 1113, 1125), Lopez is required to present some evidence to establish the prior dismissal was not the result of excusable neglect.

Lopez has not met this burden. He has not referred to any evidence in the record to establish a lack of excusable neglect or to any evidence of the circumstances surrounding the prior dismissal. Because we cannot determine if the prior dismissal was excusable under section 1387.1, subdivision (b), we cannot determine whether a third prosecution would have been barred. Accordingly, Lopez cannot establish he suffered any prejudice.⁵

Nor is there merit to Lopez's assertion that he was prejudiced because he spent more time in custody than the sentence imposed. Many of the delays in this matter were directly attributable to Lopez's actions, including his numerous *Marsden* motions, his choice to represent himself, his choice to appeal from the determination that he was incompetent, and the multiple evaluations to determine if he was competent.

We are not suggesting that Lopez did anything improper; he was merely exercising his rights. But we conclude that under these circumstances, he was not prejudiced by the delay in being brought to trial when much of the delay was beyond the control of either the trial court or the prosecutor.

II. *Miranda* Violation

Factual Summary

A section 402 hearing was held to determine if Lopez's right to counsel pursuant to *Miranda*, *supra*, 384 U.S. 436 was violated.

⁵Lopez's reliance on *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 747-748 is misplaced as that case addresses the appropriate procedure in the trial court, not on appeal. It is Lopez's obligation to establish he was prejudiced by the trial court's denial of his motion for dismissal because his right to a speedy trial was violated.

Sergeant Scott Thatcher testified he arrested Lopez at Lopez's residence on December 28, 2005. Lopez was transported to the police station where a videotaped interview occurred. Thatcher read Lopez his rights pursuant to *Miranda* at the beginning of that interview. Lopez stated he understood his rights and agreed to speak with Thatcher. The transcript of the interview confirmed Thatcher's testimony.

Lopez focused on the circumstances leading to his arrest in his cross-examination of Thatcher. Thatcher and three other officers knocked on Lopez's door. When Lopez answered, the officers identified themselves and asked for permission to enter the residence. Lopez stepped out of the way, permitting the officers to enter. Lopez sat on the couch and Thatcher began speaking with him.

Thatcher told Lopez he was investigating an incident and that Lopez was a suspect. Thatcher asked Lopez to come to the police station to be interviewed. Lopez stated he would speak with Thatcher, but he would not go to the police station unless he was arrested. Lopez also stated he would get an attorney if he was arrested. Lopez was then arrested and transported to the police station. Lopez was not read his *Miranda* rights while at his house.

Thatcher began the interview at the police station by acknowledging that Lopez had mentioned an attorney and then read Lopez his *Miranda* rights. He stated Lopez did not ask for an attorney at any time after he was arrested.

Lopez testified he was sleeping when he was awakened by the police knocking loudly on his front door. He saw several officers when he looked out his window. Lopez partially opened the door so he could speak to the officers. The officers said they wanted to come inside to speak with Lopez. Lopez refused them entry because everyone in the house was sleeping.

Thatcher said an emergency operator received a phone call stating someone inside the house was suicidal. Lopez assured Thatcher no one in the house was suicidal.

Thatcher stated he would have to check the house for himself and shoved the door open and the officers entered the house.

Lopez asked the other officers to leave once it was determined no one was suicidal. When the officers did not leave, Lopez told Thatcher that if they were not going to leave the house, he wanted to use the phone to call his attorney. Thatcher would not let Lopez make a phone call.

Thatcher then told Lopez he was investigating a crime. Lopez stated he had nothing to say and again asked to speak to his attorney. Thatcher read Lopez his *Miranda* rights. Lopez again asked for an attorney. He was arrested and transported to the police department without being allowed to call his attorney.

While at the police station, two of the officers began asking Lopez questions about the case. Lopez did not answer their questions and again asked to use the phone. Lopez repeated this request several times. He also asked the officers several times to remove his handcuffs because they were causing him pain. Finally, Thatcher came into the room and read Lopez his *Miranda* rights, as appears on the tape of the interview. Lopez felt he had no choice but to speak to Thatcher because he was prohibited from contacting his attorney.

The trial court found Lopez properly was advised of his rights and voluntarily waived his right to counsel before he answered the questions posed by Thatcher. Accordingly, Lopez's interview was deemed admissible.

Standard of Review

The applicable standard of review is well settled. We must ask "whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant. [Citation.] In reviewing the issue, moreover, the reviewing court must

‘accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. [The reviewing court] independently determine[s] from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.’ [Citation.]” (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125 (*Gonzalez*).)

Analysis

Lopez argues he unequivocally invoked his request for representation when he first spoke with Thatcher and when he asked on several occasions for the use of a phone so that he could call an attorney. The transcript of the interview confirms, however, that prior to answering any questions about the sexual assault, Lopez was advised (1) he had the right to remain silent, (2) anything he said could be used against him, (3) he had the right to an attorney before and during questioning, and (4) if he could not afford an attorney one would be appointed to represent him free of charge. After he was informed of each right, Lopez stated he understood the right. After being advised of each of his rights, Thatcher asked Lopez if “[h]aving these rights in mind” Lopez wanted “to answer some questions for me about this uh, investigation -- [¶] -- regarding sexual assault?” Lopez responded, “I sure do.”

From this evidence it is undisputed that Lopez was advised of his *Miranda* rights before the recorded interview took place, and Lopez unequivocally waived those rights. If the trial court concluded that Lopez invoked his right to counsel before the interview, it would have been required to exclude the interview. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992 [no interrogation once rights invoked unless defendant provided with counsel or personally initiates further communication with authorities].) Since the trial court denied Lopez’s motion, the trial court necessarily concluded that Lopez’s testimony on this issue was not credible. We are bound by this finding because substantial evidence supports it. (*Gonzalez, supra*, 34 Cal.4th at p. 1125.)

Therefore, the only evidence the trial court may have found credible that would support Lopez's argument is Thatcher's testimony that Lopez stated while at his residence that he would get an attorney if he was arrested. The issue is whether this statement would have been understood by a reasonable officer to be an unequivocal and unambiguous request for counsel. (*Gonzalez, supra*, 34 Cal.4th at p. 1125.) We conclude Lopez's statement cannot be so construed.

Taken literally, Lopez's statement that he would get an attorney if he was arrested merely indicates that one who is arrested and charged with a crime is entitled to an attorney. Lopez did not state that if he was arrested he would not answer any questions unless counsel was present. At best, this statement would be understood by a reasonable officer as an equivocal reference to an attorney. Therefore, in the taped interview when Lopez stated he wanted to discuss the accusations, a reasonable police officer would understand that Lopez had waived his right to counsel.

Gonzalez, cited by Lopez, supports our conclusion. Gonzalez initially agreed to answer questions about a shooting that resulted in the death of a police officer. Investigating officers suspected Gonzalez was the person who had shot the officer, but Gonzalez denied doing so. Gonzalez agreed to take a lie detector test to substantiate his denial, but also stated, "That um, one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing. Because my brother-in-law told me that if they're trying to charge you for this case you might as well talk to a public defender and let him know cause they can't" (*Gonzalez, supra*, 34 Cal.4th at p. 1119.)

The investigating officer told Gonzalez he could talk to an attorney any time and that he was going to be booked for the murder of the officer. He also told Gonzalez that booking did not "mean you're going to be filed on," and if the lie detector test results indicated Gonzalez was being truthful, more investigation would be conducted. (*Gonzalez, supra*, 34 Cal.4th at p. 1119.) The investigating officer repeated at least twice

that if Gonzalez was booked, it did not necessarily mean he would be charged with murder. (*Id.* at pp. 1119-1120.)

Gonzalez was taken the following day for the lie detector test. At the outset of the interrogation, the officer conducting the test asked Gonzalez if he had been advised of his rights and if he had waived those rights. Gonzalez answered affirmatively. The officer then asked Gonzalez if he was waiving his rights for the test. Gonzalez answered affirmatively but added, “I was going to ask you that, is there any, like—cause they told me about a public defender.” The officer asked, “What about a public defender?” Gonzalez stated, “They said that he would show up for anything.” The officer repeated that Gonzalez had a right to a public defender and explained that that was why he had asked Gonzalez about his rights. Gonzalez replied, “They read my rights, yeah.” (*Gonzales, supra*, 34 Cal.4th at p. 1120.) That was the end of the discussion about an attorney. During the test, Gonzalez admitted shooting the officer. (*Ibid.*)

After the test Gonzalez again was interrogated and admitted shooting the officer. Near the end of the interview, Gonzalez said, “I don’t have no public defender.” (*Gonzalez, supra*, 34 Cal.4th at p. 1120.) The investigating officer told Gonzalez he could have an attorney at any time and, if Gonzalez wanted an attorney, the interview would be concluded. The officer then explained to Gonzalez that he already knew the circumstances of the crime and he was merely trying to clear up some details, such as Gonzalez’s intent in shooting at the police car. Gonzalez stated that his “intent wasn’t to kill him. My intent wasn’t to hit a cop.” (*Ibid.*)

The Supreme Court concluded that Gonzalez’s rights were not violated.

“On its face, defendant’s statement was conditional; he wanted a lawyer *if* he was going to be *charged*. The conditional nature of the statement rendered it, at best, ambiguous and equivocal because a reasonable police officer in these circumstances would not necessarily have known whether the condition would be fulfilled since, as these officers explained, the decision to charge is not made by police. Confronted with this statement, a reasonable officer would have understood only that ‘the suspect *might* be

invoking the right to counsel,' which is insufficient under *Davis* [v. U.S. (1994) 512 U.S. 452] to require cessation of questioning. [Citation.] Here, moreover, the detectives responded to defendant's statement by explaining to him the difference between being arrested and booked and being charged, thus providing him with an opportunity to clarify his meaning, but at no point in this initial exchange did defendant *unequivocally* request the *immediate* presence of an attorney before he would answer any more questions. It is this type of statement *Davis* requires before the police must terminate the interrogation. [Citation.] Defendant's statement did not meet this standard of clarity." (*Gonzalez, supra*, 34 Cal.4th at p. 1126.)

Lopez's statement to Thatcher similarly was conditional; if he was arrested, he was going to get a lawyer at some unspecified point in the proceedings. The only significant difference in the two statements is that Lopez never specifically tied his desire for appointment of an attorney to a specific event. Accordingly, Lopez's statement was ambiguous and equivocal because a reasonable police officer in Thatcher's position would not know necessarily whether Lopez meant he would get an attorney for trial, or before any questioning occurred, or at some other time. Moreover, Lopez's statement once the interview began that he wanted to discuss the allegations negated any possibility that a reasonable officer would understand that Lopez wanted an attorney before he was interviewed. Not only did Lopez's statement not meet the required standard of clarity, but, by waiving his rights at the beginning of the interview, Lopez's conduct directly contradicted any intent to demand an attorney before answering any questions.

The trial court thus concluded correctly that Lopez's *Miranda* rights were not violated.

Involuntary Statement

Lopez also contends the interview should have been suppressed as involuntary because the police (1) arrived at his house around 5:30 a.m., (2) entered without a warrant, (3) refused to leave when asked to do so, (4) arrested him, (5) placed him in handcuffs, (6) refused to adjust the handcuffs despite complaints that the handcuffs were

causing him pain, and (7) ignored his numerous requests to use a phone to call his attorney.

“When a defendant challenges the admission of his or her statements on the ground they were involuntarily made, the prosecution must prove by a preponderance of the evidence the statements were, in fact, voluntary. [Citation.] A statement is involuntary if it is ‘not “the product of a rational intellect and a free will.”’ [Citation.] The court in making a voluntariness determination ‘examines “whether a defendant’s will was overborne” by the circumstances surrounding the giving of a confession.’ [Citation.] Coercive police tactics by themselves do not render a defendant’s statements involuntary if the defendant’s free will was not in fact overborne by the coercion and his decision to speak instead was based upon some other consideration. [Citations.] The determination whether the authorities improperly coerced a defendant’s statements involves an evaluation of the totality of the circumstances, including the nature of the interrogation and the circumstances relating to the particular defendant. [Citation.]” (*People v. Rundle* (2008) 43 Cal.4th 76, 114 (*Rundle*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We independently review the trial court’s determination that a defendant’s statement was voluntary; however, we ““accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.”” [Citations.]” (*Rundle, supra*, 43 Cal.4th at p. 115.)

We begin by observing that Lopez failed to raise this argument in the trial court. Therefore, the issue is forfeited. (*People v. Ramirez* (2006) 39 Cal.4th 398, 472.)

We also reject the argument on the merits. Lopez cannot identify any threat, promise of leniency, or other conduct that would have overcome his free will when he agreed to be interviewed by Thatcher. Instead, Lopez argues that officers refused to allow him to make a phone call to his attorney, an assertion rejected by the trial court and that was supported by substantial evidence. (*Rundle, supra*, 43 Cal.4th at p. 115.)

Lopez also appears to argue the police forced their way into his house, but the trial court found Lopez consented to the entry, a finding also supported by substantial evidence.

Nor do we place any significance on the police arriving at approximately 5:30 a.m. This hour is not so unreasonable as to be evidence of coercion. Police officers cannot be expected to know the sleeping habits of individuals they seek to interview or arrest.

That Lopez was placed in handcuffs is not evidence of coercion. It is typical police procedure. As defense counsel conceded, there was probable cause to arrest Lopez. The decision to leave Lopez in handcuffs during the interview was not explored at trial but may have been the product of concern for officer safety. The record simply is insufficient to permit us to conclude that this condition resulted in Lopez giving an involuntary statement.

We conclude there is no merit to Lopez's claim that his statement was involuntary.

III. *Pitchess* Motion

Lopez filed a *Pitchess* motion pursuant to Evidence Code sections 1043 and 1045 seeking discovery of Thatcher's personnel file. Lopez asserted he did not permit Thatcher to enter his residence on the morning he was arrested and he did not waive his right to an attorney. Nor did he agree to answer questions posed by Thatcher. Since Thatcher testified otherwise, Lopez sought information to support his argument that Thatcher had a history of being untruthful.

Personnel records are statutorily defined as confidential and are subject to discovery only pursuant to the procedures set forth in the Evidence Code. (Pen. Code, §§ 832.7, 832.8; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 52.) "Evidence Codes sections 1043 and 1045 ... set forth the procedures for discovery. A party seeking disclosure must file a written motion, with notice to the governmental agency having custody of the records sought. The motion must describe the type of records or information sought and provide affidavits showing good cause for the disclosure, setting forth its materiality to the pending litigation and stating on reasonable belief that the identified agency possesses the records or information. [Citation.] The trial court must then make an in camera examination of the information produced by the agency and

exclude from disclosure certain categories of information, including complaints more than five years old, the conclusions of any officer investigating a complaint, and facts that are so remote as to make disclosure of little or no practical benefit. [Citation.] [¶] The court may make any order that justice requires to protect the officer or agency from unnecessary annoyance, embarrassment, or oppression, and must order that any records disclosed shall not be used for any purpose other than a court proceeding pursuant to applicable law. [Citations.] The statutory scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense. [Citation.]" (*City of San Jose*, at pp. 52-53.)

The issue here is whether Lopez established good cause for the discovery of Thatcher's personnel records.

The trial court is granted wide discretion when ruling on motions to discover police personnel records. (*People v. Memro* (1995) 11 Cal.4th 786, 832, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 643.) "Good cause" generally can be defined as a sufficient connection between the records sought and the issue or issues in the case that make the records relevant. (*Memro*, at p. 832.) The defendant seeking an officer's personnel records must demonstrate "the requested information will facilitate the ascertainment of the facts and a fair trial. [Citations.] The requisite showing may be satisfied by general allegations which establish some cause for discovery other than 'a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime.' [Citations.]" (*Pitchess, supra*, 11 Cal.3d at pp. 536-537.)

The declaration filed in support of Lopez's motion stated, in relevant part, that a substantial issue in the case was whether there was an unlawful entry into Lopez's residence, whether Lopez validly waived his right to an attorney and his right to remain

silent, and whether the officers had probable cause for arresting Lopez. There was no attempt to explain why any of these issues were “substantial.”

It is true there was a conflict in the testimony concerning the police officers’ entry into Lopez’s residence the morning he was arrested. Nonetheless, it is unclear how resolving this dispute in Lopez’s favor would aid any possible defense to the charges he faced. Defense counsel admitted the police had probable cause to arrest Lopez. No evidence was obtained from Lopez’s residence the morning he was arrested, and it was later searched pursuant to a search warrant. Lopez has not identified any significant evidence discovered when he was arrested.

While Lopez argues his interview with Thatcher was the result of a violation of his *Miranda* rights, an argument we have rejected, he does not suggest how this statement interfered with his ability to defend against the charges. Indeed, there is no attempt to explain why Lopez *would have wanted to exclude his statement* since his only defense to the rape charges was based on his assertion that the victim consented to the events, and the only evidence of consent came from the interview.

Lopez relies on two cases to support his argument. In *People v. Hustead* (1999) 74 Cal.App.4th 410 (*Hustead*), Hustead was charged with felony evasion of arrest, in violation of Vehicle Code section 2800.2. Hustead was arrested after leading an officer on a vehicle chase through a business district. The officer testified Hustead drove the vehicle in a dangerous manner while he was chasing Hustead. Hustead argued he drove in a safe manner, which would have avoided a felony charge.

To support his request for access to the officer’s personnel records, Hustead’s attorney stated in a declaration that Hustead asserted he did not drive in the manner described in the police report and that his driving route was different than that stated in the report. Hustead’s counsel explained that as a result of the significant misstatements in the police report, a material and substantial issue in the trial would be the character, habits, customs and credibility of the officer. This court found those allegations

sufficient to require the trial court to conduct an in camera review of the officer's personnel record. (*Hustead, supra*, 74 Cal.App.4th at pp. 416-417.)

Lopez claims his case is identical to *Hustead*. Instead, we conclude that the differences between the two cases establish the trial court did not abuse its discretion. The only two percipient witnesses in *Hustead* were the officer and the defendant. The defendant alleged that he would testify the police report was erroneous in several important respects. These facts established the outcome of the case was dependent on the credibility of the two witnesses. Therefore, evidence in the arresting officer's personnel record that would reflect on his credibility would assist the defense of the case.

In contrast, Lopez failed to explain *why* Thatcher's credibility was significant to his defense. Thatcher was the investigating officer, not a percipient witness. While Thatcher's credibility was an issue with regard to the events that occurred on the morning Lopez was arrested, those events did not affect the charges directly, and Lopez failed to explain how Thatcher's credibility was relevant to his defense to the charges. Certainly, Lopez did not provide any explanation to the trial court when he made his motion. And subsequent events suggest the events on the morning Lopez was arrested were not relevant to Lopez's defense.

Lopez did not deny he had sex with the victim, but he argued the intercourse was consensual. Since Lopez did not testify at trial, the primary evidence to support his defense was the interview with Thatcher. Moreover, unlike *Hustead*, there was a video and audio recording of the interview that established Lopez voluntarily waived his rights.

Lopez also relies on *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*). Warrick was charged with possession of cocaine base for sale, in violation of Health and Safety Code section 11351.5. The police report stated that officers observed Warrick in an area known for drug trafficking. When the officers exited their marked patrol vehicle, Warrick fled, discarding a substance that resembled rock cocaine. Warrick was arrested after a short pursuit. (*Warrick*, at pp. 1016-1017.)

Warrick sought disclosure of the arresting officers' personnel records seeking information on past complaints for false arrests, false police reports, or fabricating evidence. Warrick submitted a declaration stating he admitted being in the area and fleeing from officers. He asserted, however, that he was in the area to purchase rock cocaine, not sell it. Warrick fled when he saw the officers because he was concerned he would be arrested on an outstanding parole violation. He denied possessing or discarding any rock cocaine. Defense counsel argued the officers, not knowing who had discarded the rock cocaine, falsely claimed to have seen the defendant do so. The records sought would be used to establish the officers were not credible. (*Warrick, supra*, 35 Cal.4th at p. 1017.)

The trial court denied the motion, finding that Warrick's theory, while possible, was not plausible. Accordingly, the trial court concluded Warrick failed to establish good cause for the disclosure of the personnel records. The Court of Appeal agreed with the trial court.

The Supreme Court began its analysis by confirming that regardless of how the inquiry is described, "a showing of good cause requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events. This court has long required that the information sought must be described with some specificity to ensure that the defendant's request is not so broad as to garner "all information which has been obtained by the People in their investigation of the crime" but is limited to instances of officer misconduct related to the misconduct asserted by the defendant. [Citations.] [¶] This specificity requirement excludes requests for officer information that are irrelevant to the pending charges. [Citation.] And it enables the trial court to identify what types of officer misconduct information, among those requested, will support the defense or defenses proposed to the pending charges. This inquiry establishes the statutorily

required materiality prong of the good cause showing that a defendant must make to receive in-chambers review of potentially relevant officer records.” (*Warrick, supra*, 35 Cal.4th 1011 at pp. 1021-1022.)

In discussing the Court of Appeal’s reasoning, the Supreme Court reiterated that good cause under section 1043 required defense counsel to provide a declaration that proposed “a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses. These requirements ensure that only information ‘potentially relevant’ to the defense need be brought by the custodian of the officer’s records to the court for its examination in chambers. [Citations.] [¶] Counsel’s affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.” (*Warrick*, 35 Cal.4th at pp. 1024-1025.)

The Supreme Court held that to establish a plausible factual scenario of officer misconduct, the declaration must assert a course of conduct that “might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. Such a showing ‘put[s] the court on notice’ that the specified officer misconduct ‘will likely be an issue at trial.’ [Citation.] Once that burden is met, the defendant has shown materiality under section 1043.” (*Warrick, supra*, 35 Cal.4th at p. 1026.) The Supreme Court concluded the factual scenario described by defense counsel was plausible under this test, thus requiring the trial court to examine the personnel records in camera. (*Id.* at p. 1027.)

We have quoted *Warrick* at length because it supports our conclusion that the trial court did not abuse its discretion in denying Lopez’s motion. First, like *Hustead*,

Warrick is distinguishable from this case because the defendant and the arresting officers were the only percipient witnesses to the alleged crime, and the defendant alleged the events described in the police report that led to the charges were fabricated by the officers. Thus, the credibility of the officers was directly at issue.

More importantly, the Supreme Court repeatedly emphasized the defendant seeking discovery of police personnel records must demonstrate a logical connection between the information sought and a proposed defense to the charges and must demonstrate why the information sought would be admissible or how the information sought would lead to the discovery of admissible evidence.

Lopez's declaration did not establish any connection between the proposed discovery and a defense to the charges, or how the information sought would be admissible at trial, or why the information would lead to the discovery of admissible evidence. This failure rendered the motion insufficient to require the trial court to perform an in camera inspection of Thatcher's personnel records.

Ineffective Assistance of Counsel

As a final attack, Lopez argues that if the motion was insufficient, then defense counsel was ineffective. The argument, it appears, is that because defense counsel stated he would file another motion, but never did so, he was ineffective.

A defendant is entitled to a new trial if he received ineffective assistance of counsel at trial. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1036.) "Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]

“Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel’s conduct from counsel’s perspective at the time. [Citation.] A court must indulge a strong presumption that counsel’s acts were within the wide range of reasonable professional assistance. [Citation.] ... Nevertheless, deference is not abdication; it cannot shield counsel’s performance from meaningful scrutiny or automatically validate challenged acts and omissions. [Citation.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

Lopez has failed to meet either prong required to establish ineffective assistance of counsel. We begin with two significant facts. First, the record establishes that Lopez was a very difficult client. The *Pitchess* motion was filed by defense counsel at Lopez’s direction and pursuant to handwritten instructions prepared by Lopez. When Lopez later filed one of his numerous *Marsden* motions, defense counsel informed the trial court of this fact and stated that he could and would file another *Pitchess* motion before trial.

The second significant fact is that the attorney who filed the *Pitchess* motion later was relieved pursuant to a *Marsden* motion filed by Lopez. Accordingly, the failure to file a second *Pitchess* motion required the attorney who assumed Lopez’s representation to do so if there were sufficient grounds. Lopez has failed to suggest in his brief how such a motion would have assisted his defense in any manner. We accept this lack of argument as a concession that Thatcher’s personnel records simply were not relevant to his defense of the case.

This concession also establishes there is not a reasonable possibility Lopez would have achieved a better result at trial if the information in Thatcher’s personnel file had been examined by the trial court in camera. If the information in Thatcher’s personnel file was not relevant to Lopez’s defense, then obtaining that information would not have aided him in any manner and would not have created any likelihood of a better result.

IV. Necessarily Included Offense

Lopez was found guilty of misdemeanor battery as a lesser included offense to the rape charged in count 1 and of battery causing great bodily injury in count 2. Lopez argues that because the two counts were based on his attack on the victim, and occurred at the same time, then count 1 is a lesser included offense to count 2. This argument is based on the assumption that there was one indivisible course of conduct.

The People argue there were two separate and distinct acts that resulted in the two counts. The first count was based on the assertion that Lopez forced the victim to have intercourse with him. The second count was based on the assertion that Lopez choked the victim and placed a rag soaked in chemicals over her mouth, purportedly to increase her enjoyment of the episode.

To resolve these issues, we must review the relevant testimony and the arguments of the attorneys. The victim had known Lopez for approximately two years before the incident. They enjoyed an intimate relationship and lived together for at least part of that time. Sometime after they began dating, Lopez became more controlling, always wanting to know the victim's location.

The two enjoyed a sexual relationship that included vaginal, oral, and anal intercourse. The relationship did not include bondage or asphyxiation.

By December 2005, the victim was trying to end the relationship with Lopez. By December 25, Lopez was calling her repeatedly and asking her to come see him. On December 27, the day of the incident, Lopez called her several times asking her to come see him. The victim agreed to see him and brought him a Christmas present. Lopez was excited she was coming over.

When the victim arrived at Lopez's house, Lopez was waiting in the front yard wearing a robe she had bought him. Lopez's eight-year-old son also was at the residence.

After Lopez and the victim entered the house, Lopez asked the victim to accompany him into his bedroom. She went into the bedroom and lay down on the bed

because she was tired. They spoke for a short time and then Lopez began tying her up with rope. The victim struggled and asked Lopez what he was doing.

After Lopez tied the victim's hands, he removed her pants and underwear. He then tied her ankles. Lopez inserted his penis into the victim's vagina. She told Lopez several times she did not want to have intercourse because she was on her period, but he ignored her.

After Lopez ejaculated, he got out of the bed and found a white rag and an aerosol can. Lopez soaked the cloth with the contents of the aerosol can (ether). Lopez told the victim he was going to kill her, but it would be painless because he was going to use the ether to suffocate her first.

Lopez put the cloth over the victim's face. She tried to fight him off, but Lopez kept the cloth over her face, forcing her to breathe the vapors. Lopez then began to choke her. The victim kept fighting, but she eventually lost consciousness and urinated on herself.

When he was finished, Lopez cut the ropes and apologized for the incident, although he blamed the victim for his actions.

The prosecution argued in closing that Lopez raped the victim and pointed out that Lopez and the victim both agreed to what had occurred, and the only issue was whether the victim consented to those events. The prosecutor also pointed out that if the jury found Lopez guilty of rape, then it would have to resolve the special allegations that Lopez engaged in (1) tying or binding the victim, (2) infliction of great bodily injury on the victim within the meaning of section 667.61, subdivision (e)(3), (3) personal use of a deadly weapon, and (4) infliction of great bodily injury within the meaning of section 12022.7.

The prosecutor explained that use of ether by Lopez was the basis for the infliction of great bodily injury enhancements, as well as the deadly weapon enhancement. The prosecutor argued the rape continued for the entire time the victim was bound, which

included the period during which Lopez covered the victim's mouth with the rag infused with ether. The prosecutor also argued that count 2, battery causing serious bodily injury, was based on putting the rag infused with ether over the victim's face. Finally, the prosecutor argued that loss of consciousness is great bodily injury within the meaning of the relevant statutes.

The prosecutor did not mention on what acts the lesser included offenses would be based.

Lopez's attorney agreed the issue was consent and argued the victim consented to each of the acts that occurred.

The trial court instructed the jury, in relevant part, that misdemeanor battery was a lesser included offense to both counts 1 and 2, and that great bodily injury included loss of consciousness.

Lopez argues his misdemeanor battery conviction is a necessarily included offense to the count charging he committed battery resulting in great bodily injury. On this record, we agree.

Both attorneys agreed the only issue on the rape charge was consent. If the victim consented to the intercourse, no crime was committed. If she did not consent, Lopez was guilty of rape. We cannot conceive of any evidence that would allow the jury to conclude the intercourse was consensual, but a battery occurred during the act of intercourse.

The People argue Lopez was convicted of two separate acts, the act involving the intercourse and the act of putting the rag infused with ether over the victim's face. The People, however, fail to explain what act that occurred during intercourse would constitute a battery since the jury found that the victim consented to having intercourse with Lopez, which would appear also to include the acts that led up to the two having intercourse, i.e., the bondage. The victim testified she did not consent to being bound, nor did she consent to having intercourse with Lopez. Since the jury concluded the

victim consented to the intercourse, it naturally follows the jury concluded the victim consented to the bondage.

The prosecutor argued the rape continued as long as the victim was bound and argued the special allegations on the rape count for infliction of great bodily injury occurred when Lopez placed the rag infused with ether over the victim's face. He also argued this act constituted the battery resulting in great bodily injury alleged in count 2, emphasizing for both allegations that the great bodily injury occurred when the victim lost consciousness. Indeed, the trial court instructed the jury that loss of consciousness constituted great bodily injury.

The jury did not make a finding on the special allegations because it found Lopez not guilty of rape. It would appear, however, that when the jury found Lopez guilty of the lesser included crime of misdemeanor battery, it did so based on Lopez covering the victim's face with the rag infused with ether. The prosecutor did not argue otherwise, and there is nothing in the record to support a different conclusion. (*People v. Siko* (1988) 45 Cal.3d 820, 825-826.)

Indeed, at oral argument counsel for the People conceded that this analysis of the prosecution's approach and the jury's verdict is correct.

On this unique record, the only logical conclusion we can reach is that the jury found Lopez guilty of misdemeanor battery and battery resulting in great bodily injury based on the same act -- placing the rag infused with ether over the victim's face.

Because Lopez was convicted of multiple alternative charged offenses, we apply the "element test" to determine if one of the charged crimes was necessarily included in the other crime. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985 (*Ramirez*).) In this test, "we look strictly to the statutory elements, not to the specific facts of a given case. [Citation.] We inquire whether all the statutory elements of the lesser offense are included within those of the greater offense. In other words, if a crime cannot be

committed without also committing a lesser offense, the latter is a necessarily included offense. [Citations.]” (*Ibid.*)

A detailed analysis is unnecessary. The only difference in the elements of the two crimes is that battery resulting in great bodily injury has one more element than misdemeanor battery -- the battery actually caused great bodily injury. Since one committing battery resulting in great bodily injury must always commit misdemeanor battery, misdemeanor battery is a necessarily included offense and multiple convictions are prohibited. (*Ramirez, supra*, 45 Cal.4th at p. 984.)

V. Fines

The trial court imposed a fine of \$20 pursuant to Government Code section 76104.7 and a \$200 parole revocation restitution fine pursuant to Penal Code section 1202.45. Lopez argues, and the People concede, these fines must be stricken.

Government Code section 76104.7 imposes a penalty on criminal offenses to be used for the state DNA identification fund. This statute was enacted in 2006 and became effective July 12, 2006. (Stats. 2006, ch. 69, § 18.) The crimes of which Lopez was convicted were committed in 2005. Lopez correctly argues that imposition of fines enacted after the date the crime was committed constitutes an ex post facto law and thus is unconstitutional. (*People v. Batman* (2008) 159 Cal.App.4th 587, 590-591.)

Section 1202.45 requires the trial court to impose a fine in “every case where a person is convicted of a crime and whose sentence includes a period of parole.” Lopez argues this fine was improperly imposed because the trial court did not include a period of parole at the sentencing hearing.

Despite the People’s concession, we conclude there was no error. In the companion case to this appeal (*People v. Lopez* (June 26, 2012, F062621) [nonpub. opn.]), we conclude that because a period of parole was statutorily mandated, Lopez was on parole at all times after the sentencing hearing. Therefore, imposition of the fine was proper.

DISPOSITION

The conviction for misdemeanor battery is reversed. The \$20 fine imposed pursuant to Government Code section 76104.7 is vacated. The judgment is affirmed in all other respects. The matter is remanded to the trial court to correct the abstract of judgment as necessary and forward it to the appropriate agencies.

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

POOCHIGIAN, J.